Supreme Court, U.S.
FILED
SEP 21 1998
OFFICE OF THE CLERK

No. 98-310

In The

Supreme Court of the United States

October Term, 1997

THE STATE INSURANCE FUND,

Petitioner,

vs.

KENNETH G.M. MATHER, TRUSTEE for the ESTATE OF SOUTHERN STAR FOODS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAMELA H. GOLDBERG
Counsel of Record
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
320 South Boston, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0400

Attorneys for Respondent

September 17, 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

37 pp

QUESTION PRESENTED

Petitioner has framed the question before this Court as follows: "[d]oes the [workers' compensation] insurance that Southern Star procured for its employees constitute an employee benefit plan such that the Fund's claim for unpaid premiums is entitled to priority status under section 507 (a)(4) [of the United States Bankruptcy Code]"? Respondent asserts that the issue determined by the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit"), in *In re Southern Star Foods, Inc.*, 144 F.3d 712 (10th Cir. 1998) is qualitatively different. The Tenth Circuit framed the issue before it as whether premiums for workers' compensation insurance are "contributions to an employee benefit plan." Respondent submits that the word "contribution" is at the heart of the matter and, therefore, a critical aspect of this Court's analysis.

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENTS

Respondent, as the bankruptcy trustee for the bankruptcy estate of Southern Star Foods, Inc. ("Southern Star"), informs the Court that Southern Star has no parent or subsidiary companies.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENTS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

REASONS FOR DENYING CERTIORARI 1

I. This Court's Grounds For Certiorari 2

II. The Instant Case Lacks The Compelling Reasons Warranting Review On Certiorari 3

III. The Purported Conflict Among The Decisions Of The Circuit Courts Of Appeals 8

A. The Tenth Circuit Decision – The Southern Star Case 12

B. The Eighth Circuit Decision – The HLM Case 16

C. The Ninth Circuit Decision – The Plaid Pantries Case 20

D. There Is No Meaningful And Important Conflict Among The Circuit Courts 21

IV. Misapplication of Law 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

In re AOV Industries, Inc., 85 B.R. 183 (Bankr. D.C. 1988) 20

In re Allentown Moving & Storage, Inc., 208 B.R. 835 (Bankr. E.D. Pa. 1997), *aff'd*, 214 B.R. 761 (E.D. Pa. 1997) 24

In re Amarex, 853 F.2d 1526 (10th Cir. 1988) 28

In re Birmingham Nashville Express, Inc., 221 B.R. 194 (Bankr. M.D. Tenn. 1998) 24

In re Braniff, Inc., 218 B.R. 628 (Bankr. M.D. Fla. 1998) 24

Crooks v. Harrelson, 282 U.S. 55, 51 S. Ct. 49, 75 L. Ed. 156 (1930) 8

Employers Ins. of Wausau v. Plaid Pantries, Inc., 10 F.3d 605 (9th Cir. 1993) ..... *passim*

Employers Ins. of Wausau v. Ramette (In re HLM Corp.), 183 B.R. 852 (D. Minn. 1994) 16, 19, 28

In re HLM Corp., 165 B.R. 38 (Bankr. D. Minn. 1994) 16, 18, 19

In re HLM Corp., 62 F.3d 224 (8th Cir. 1995) ..... *passim*

Joint Indust. Bd. v. United States, 391 U.S. 224, 88 S. Ct. 1491, 20 L. Ed. 2d 546 (1968) 18, 20, 28

Matter of Jartran, Inc., 732 F.2d 584 (7th Cir. 1984) 28

In re The Montaldo Corp., 207 B.R. 112 (Bankr. M.D.N.C. 1997) 8

Nathanson v. NLRB, 344 U.S. 25, 73 S. Ct. 80, 97 L. Ed. 23 (1952) 28

TABLE OF AUTHORITIES – Continued

Page

New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund, 886 F.2d 714 (4th Cir. 1989).....10, 11

In re Olga Coal Co., 194 B.R. 741 (Bankr. S.D.N.Y. 1996).....28

In re P.J. Nee Co., 36 B.R. 609 (Bankr. D. Md. 1983) 27

Rice v. Sioux City Mem. Park Cemetery, Inc., 349 U.S. 70, 75 S. Ct. 614, 9 L. Ed. 897 (1955).....24

In re Saco Local Development Corp., 711 F.2d 441 (1st Cir. 1983) 11, 12

Sorenson v. Secretary of Treasury, 475 U.S. 851, 106 S. Ct. 1600, 89 L. Ed. 2d 855 (1986).....8

In re Southern Star Foods, Inc., 144 F.3d 712 (10th Cir. 1998), *aff'g*, 210 B.R. 838 (Bankr. 10th Cir. 1997), *aff'g*, 201 B.R. 291 (Bankr. E.D. Okla. 1996).....*passim*

In re Suburban Motor Freight, Inc., 998 F.2d 338 (6th Cir. 1993) 9

United States v. Embassy Restaurant, Inc., 359 U.S. 29, 79 S. Ct. 554, 3 L. Ed. 2d 601 (1959) 14, 18, 20, 21

STATE CASES

Brooks v. A.A. Davis & Co., 124 Okla. 140, 254 P. 66 (1926).....16

Carroll v. District Court, 579 P.2d 828 (Okla. 1978) 16

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

11 U.S.C. § 507(a)(4) ..... *passim*

11 U.S.C. § 507(a)(7) 10

MISCELLANEOUS

Black's Law Dictionary 601 (5th ed. 1979) 27

H.R. Rep. No. 95-595, at 187 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6148 ..... 14, 15

23 *Moore's Federal Practice* § 510.21[1] at p. 510-14 (Mathew Bender 3d ed.) 9

23 *Moore's Federal Practice* § 510.21[2] at p. 510-16 (Mathew Bender 3d ed.) 25

S. Rep. No. 95-989, at 69 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5855 15

Sup. Ct. R. 10 ..... *passim*

Webster's Ninth New Collegiate Dictionary 494 (1983) 27

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Kenneth G.M. Mather, the duly authorized and appointed trustee of the bankruptcy estate of Southern Star Foods, Inc., respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari (the "Petition"), seeking review of the Tenth Circuit's opinion in this case.

REASONS FOR DENYING CERTIORARI

Petitioner asserts that review on certiorari is appropriate because this case involves "an important issue of unsettled federal bankruptcy law which has not previously been before this Court" and because the circuit courts of appeals that have considered the issue have rendered contradictory decisions which represent an irreconcilable conflict. Petition at pp. 2, 6. Respondent respectfully disagrees that the instant case merits review on certiorari.

While the issue before the Court has the potential of affecting the administration of a bankruptcy case, the present importance of the issue is substantially diminished by the fact that the "dissenting" circuit court opinion was the first to be rendered and has been largely rejected. Moreover, it would appear that the issue in "true" conflict between the circuit courts is a very narrow one that is likely to have little impact on most bankruptcy cases. Alternatively, it would appear that the "dissenting" circuit court opinion arises more logically from a misapplication of the law than a misinterpretation of the law.

I. This Court's Grounds For Certiorari.

This Court's Rule 10 sets forth the considerations governing review on certiorari and provides, in pertinent part, as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . .
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The above text of Rule 10 contains certain critical changes that were made in 1995. The 1995 revision to Rule 10 replaced the descriptive words "special and important" with the word "compelling." Also, the last sentence of Rule 10, setting out two circumstances under which the Court rarely grants certiorari, was added in 1995. These changes appear to have had the purpose of narrowing the grounds pursuant to which certiorari will be granted.

The following may be gleaned from the language of Rule 10. In the instant case, Petitioner has the burden of showing this Court that there is a compelling reason to support review on certiorari, which may or may not be

satisfied by an asserted conflict among the decisions of a number of circuit courts of appeals. Further, the error asserted by Petitioner must be more than a misapplication of a properly stated rule of law. Respondent respectfully submits that Petitioner has not satisfied these burdens, and the Petition should be denied.

II. The Instant Case Lacks The Compelling Reasons Warranting Review On Certiorari.

The following excerpts from Petitioner's "Statement of the Case" comprise Petitioner's attempt to illustrate that there are compelling reasons to grant certiorari.

> This case presents an important issue of unsettled federal bankruptcy law which has not previously been before this Court. . . . Resolution of this issue will have far-reaching ramifications for workers, employers and insurers. Virtually all fifty states have some type of mandatory workers' compensation system to protect workers injured on the job. Much of that protection is provided through workers' compensation insurance. Accordingly, as employers continue to suffer financial difficulties and seek the protection of the Bankruptcy Code, issues regarding the priority to be granted workers' compensation insurers' claims will continually arise.
>
> * * *
>
> This conflict affects far more than the insurance industry, it also affects the thousands of laborers whose employers provide them with insurance coverage. If an employer does not maintain that insurance by paying premiums as they become

> due, employees are (in most states) left completely unprotected if they become ill or are injured on the job, because in bankruptcy there may be no other source from which they can collect benefits. By paying premiums the employer secures for its employees the benefit of insurance for workplace illness or injury without regard to fault. The presence of a workers' compensation insurance premium priority will – like all other employee benefit priorities – encourage insurance carriers to continue to do business with financially troubled employers, enabling them to retain employees and perhaps even avoid bankruptcy.

Petition at pp. 2-4.

Petitioner misperceives the importance and the impact of the issue before this Court. Further, Petitioner's attempt to characterize the present issue as a new or novel one is disingenuous. Workers' compensation laws and the federal bankruptcy laws have long existed. Indeed, § 507(a)(4) of the Bankruptcy Code, the statute at issue herein, was enacted in 1978. Notwithstanding its existence for twenty years, the courts that have directly considered the present question are a mere handful. This might be surprising considering the probability of such claims existing in the typical business bankruptcy case, for it is only logical to assume that when an employer files for bankruptcy relief, many of its debts have gone unpaid, including debts owed to a workers' compensation insurance carrier. However, Respondent respectfully submits that the dearth of case law on this issue is more indicative of the clarity of § 507(a)(4) and its legislative

history, as well as the general recognition that workers' compensation issues are the province of state law.

Whether or not an employer complies with workers' compensation laws and the resulting effects on that employer's employees are precisely a part of the subject matter such laws are designed to address. Petitioner would have this Court, by "judicially legislating" changes to § 507(a)(4), give deference to the various state public policies that might underlie workers' compensation laws in "virtually all fifty states." However important and admirable workers' compensation laws may be at the various state levels, such laws and the policies behind them are simply irrelevant to considerations involving the priorities to be afforded in a bankruptcy setting. It is neither the goal nor the function of federal bankruptcy laws to cure the ills of these employer/employee issues. Moreover, Petitioner's position is inherently illogical. Assuming *arguendo* claimants such as Petitioner are entitled to priority treatment in bankruptcy, such treatment does nothing to ensure that the employer has complied with workers' compensation laws and employees are fully protected. In fact, the only reason such claims exist is because precisely the opposite has happened and the employer has failed to ensure the continuation of its workers' compensation coverage. Moreover, to allow the workers' compensation insurer priority treatment in bankruptcy benefits the insurer but has absolutely no beneficial effect on the employer (who is in bankruptcy, usually out of business, and unconcerned whether its insurer gets priority treatment) or the employees (who have either had their claims covered while the insurance was in force or are left with their own available remedies

in bankruptcy). Simply put, the possible payment[1] of the priority claim to the insurer does not inure to the benefit of employers or employees.

Petitioner argues that the presence of a workers' compensation insurance premium priority will: (1) encourage insurance carriers to continue to do business with financially troubled employers, (2) enable employers to retain employees, and (3) even enable employers to avoid bankruptcy. Petition at pp. 3-4. Such arguments are likewise illogical and belied by the facts of the case below. Petitioner canceled Southern Star's workers' compensation insurance on November 17, 1994 because Southern Star had failed to pay the premiums. An involuntary bankruptcy petition was filed against Southern Star on December 23, 1994. Petitioner filed a proof of claim in the bankruptcy case asserting a priority claim. Notwithstanding Petitioner's belief that it had a priority claim for its unpaid workers' compensation insurance premiums, it still canceled Southern Star's insurance coverage for non-payment of premiums. Petitioner apparently made a business decision that it no longer was going to take the risk of continuing to do business with Southern Star despite its belief (assuming it even thought about it) that it would have a priority claim in bankruptcy. After all, there is no guarantee that even priority claims will be paid in a Chapter 7 bankruptcy case.

---

[1] There is certainly no guarantee in a Chapter 7 case, and little possibility in a no-asset case, that even fourth priority claims will be paid. In the instant case, if not for the fact that the Southern Star bankruptcy estate has sufficient assets to pay priority claims, it is doubtful the Petition would be before this Court.

Therefore, the actual facts of this case show that whether or not an insurer has a priority claim following the insured's bankruptcy has absolutely no effect on the insurer's actions in canceling the insured's workers' compensation insurance coverage. Further, such presumed priority status did not get the premiums paid prepetition, did not ensure the continuation of the relationship between Petitioner and Southern Star, and certainly did not allow Southern Star to avoid bankruptcy. Most importantly, allowing priority status to claims like Petitioner's claim confers absolutely no benefit on the employees of the bankrupt company.

Likewise, it is ludicrous to suggest that the status of Petitioner's claim as a priority claim (as well as those similarly situated) would affect an employer's ability to retain employees. It is doubtful that any employees (except for those at the management level) have any knowledge regarding the status of their employer's workers' compensation insurance coverage, as it is not part of their traditional insurance benefits. More importantly, the priority issue only arises following bankruptcy, which in most cases will be a Chapter 7 liquidation where there is no further need for employees. Finally, the idea that affording Petitioner's claim (and those like it) priority status will allow an employer to avoid bankruptcy is a total nonsequitur, and ignores the economic factors that cause bankruptcy filings in the first place. Such factors simply do not include the characterization of creditor claims postpetition.

Essentially, Petitioner is simply seeking a judicial revision of § 507(a)(4) that will benefit no one other than

the workers' compensation insurance industry.[2] As echoed by one bankruptcy court, this was clearly not Congress' goal or intent in enacting § 507(a)(4).

> [T]here is no basis for supposing that Congress adopted § 507(a)(4) as a means of protecting or promoting the solvency of the insurance industry or out of concern that without the § 507(a)(4) priority the industry would be unable to provide the benefits required under policies of insurance covering employees. In fact, neither of the Supreme Court cases which prompted the enactment of § 507(a)(4) involved insurance policies or insurance companies.
>
> In actuality, [the insurer] is in the same boat as all the other unsecured, non-priority creditors who also provided goods and/or services in the belief that the Debtor would continue in business and pay for the goods and services in the ordinary course of business. Neither the rationale behind § 507(a)(4) nor its statutory language requires that [the insurer] be elevated above the other unsecured creditors in this case.

In re The Montaldo Corp., 207 B.R. 112, 117 (Bankr. M.D.N.C. 1997) (citations omitted).

III. The Purported Conflict Among The Decisions Of The Circuit Courts Of Appeals.

While it has been stated that the "most assured way of satisfying the requirement of Supreme Court Rule 19 [now Supreme Court Rule 10] that 'special and important

---

[2] This Court itself has warned against judicial legislation. *See Sorenson v. Secretary of Treasury*, 475 U.S. 851, 864, 106 S. Ct. 1600, 1608, 89 L. Ed. 2d 855 (1986); *Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S. Ct. 49, 50, 75 L. Ed. 156 (1930).

[now 'compelling'] reasons' for review exist is to show that the issue sought to be reviewed involves a conflict of decisions among the lower federal courts on a point of federal law," 23 *Moore's Federal Practice* § 510.21[1] at p. 510-14 (Matthew Bender 3d ed.) (quoting Harlan, *Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 551 (1958)), Rule 10 still requires that such conflict be with regard to an "important" matter. This would indicate that not all conflicts among the circuit courts of appeals will warrant certiorari. Also, it would appear that there has to be, in any event, a true conflict among these federal courts, and not a mere misapplication of the law by a single, dissenting circuit court.

The importance of the question before the Court is not enhanced by the three circuit court of appeals decisions addressing it because the purported conflict among them has been overstated by Petitioner. Petitioner asserts that there is an "irreconcilable conflict" on the "application of section 507" among the Fourth, Sixth, Ninth, Eighth and Tenth circuit courts of appeals. Petition at pp. 7-8. As a threshold matter, Respondent would point out that the Sixth Circuit[3] and Fourth Circuit decisions cited by Petitioner do not involve § 507(a)(4) and are, therefore, irrelevant to this Court's present inquiry.[4] This is exemplified by Petitioner's own statement that these cases

---

[3] Petitioner has informed Respondent that the correct cite for the case of *In re Suburban Motor Freight, Inc.* is 998 F.2d 338 (6th Cir. 1993).

[4] Petitioner would have the Court render a decision clarifying every nuance of § 507, despite the fact that the only issue properly before the Court is the narrow issue decided by the Tenth Circuit below. See the discussion in the text *infra* at pp. 22-23.

involve § 507(a)(7) and the lack of discussion of these cases in the Petition. In any event, neither the Sixth Circuit decision nor the Fourth Circuit decision are in conflict with the Eighth Circuit and Tenth Circuit decisions on the instant issue involving § 507(a)(4).[5] In fact, the Fourth Circuit's opinion is in harmony with that of the Eighth Circuit and the Tenth Circuit in a critical respect.

In *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*, 886 F.2d 714 (4th Cir. 1989), the Fourth Circuit specifically distinguished workers' compensation insurance from private insurance based on the former's mandatory character, and such distinction provides the primary basis for affording such claims priority as excise taxes.

> It is also to be noted that the West Virginia system features numerous "insurance" characteristics, such as the references to "premiums," the variable premium rates provided, and the option of self-insurance subject to the Commissioner's approval. Nevertheless, the obligation upon employers to provide and pay for workers' compensation coverage is a pecuniary burden placed upon employers by the state. The fact that the funds are raised solely to satisfy workers' compensation claims does not necessarily transform those payments into something other than taxes. Nor does the fact that, under

---

[5] Nonetheless it is interesting to note that both the Sixth Circuit and the Fourth Circuit decisions are absolutely silent with respect to § 507(a)(4) despite the fact that the priority characterization of claims for unpaid workers' compensation insurance "premiums" was directly at issue.

> the holding we state in this case, a state agency is given, as an insurer, priority in bankruptcy when a private insurer is not tip the scales against construing the workers' compensation premiums as "excise taxes"; such a difference is really only a "distinction between the sovereign power of the state and the rights of private citizenry."

Id. at 719-20 (citations omitted); *see also id.* at p. 720, n. 6. While the Fourth Circuit was not speaking to § 507(a)(4), the mandatory nature of workers' compensation insurance was likewise a critical factor for both the Eighth Circuit and the Tenth Circuit in denying priority status to such claims under § 507(a)(4). *See In re HLM*, 62 F.3d 224, 226 (8th Cir. 1994); *Southern Star*, 144 F.3d at 716.

Petitioner also contends that the First Circuit's decision in *In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983) is in conflict with the decisions of the Eighth Circuit and the Tenth Circuit. However, while *Saco* did involve the interpretation of § 507(a)(4), it did not involve workers' compensation insurance but rather an employer's master insurance plan which included group life, health and disability insurance. *See id.* at 442. Assuming *arguendo* this Court views *Saco* as relevant to the instant inquiry, the First Circuit's decision therein is not in conflict with the Eighth Circuit and Tenth Circuit decisions.[6] Petitioner misreads *Saco* when it asserts that the First Circuit rejected the notion that § 507(a)(4) requires a wage substitute or fringe benefit.

---

[6] In its decision in *Southern Star*, the Tenth Circuit expressly stated that its opinion was not in conflict with the First Circuit's *Saco* opinion. *See* 144 F.3d at 716-17.

The two issues before the *Saco* Court were: (1) whether the § 507(a)(4) priority was limited to "benefits" the employer was contractually obligated to provide through some formal agreement with the employees, and (2) whether the priority was limited to claims of employees themselves and not the insurers. *See Saco*, 711 F.2d at 448-49. The First Circuit held that a formal agreement to provide the "benefit" was not necessary and that insurers could obtain the priority for premiums. *See id.* However, the First Circuit did **not** reject the notion that the § 507(a)(4) priority is limited to fringe benefits or wage substitutes. Further, the *Saco* decision does not support the broad reading of § 507(a)(4) sought by Petitioner. In fact, the First Circuit in commenting on the statute's legislative history, is actually in agreement with the Eighth and Tenth Circuits regarding the requirement of a fringe benefit or wage substitute. "Congress' object in enacting § 507(a)(4) was to extend the 1898 Act's wage priority to new forms of **compensation**, such as insurance and other **fringe benefits**." *Id.* at 449 (emphasis added).

A. The Tenth Circuit Decision – The Southern Star Case

In *Southern Star*, the Tenth Circuit held that a claim for unpaid workers' compensation insurance premiums is not entitled to priority under § 507(a)(4). *Southern Star*, 144 F.3d at 717. The Tenth Circuit began its analysis by affirming the basic tenet of bankruptcy law that statutory priorities are to be narrowly construed. *See Southern Star*, 144 F.3d at 714. While the Tenth Circuit recognized that the Bankruptcy Code fails to define the critical phrase, "contributions to an employee benefit plan," the court

declined to read the ERISA definition of "employee benefit plan" into the Bankruptcy Code because this definition was designed to effectuate the purpose of ERISA and not the Bankruptcy Code. *Id.* Further, the Tenth Circuit found to do so would impermissibly broaden the § 507(a)(4) priority in a manner "contrary to the tenet that priorities are to be narrowly construed." *Id.*

As its first step in interpreting § 507(a)(4), the Tenth Circuit found that the phrase "contributions to an employee benefit plan" is ambiguous and, therefore, resort to the statute's legislative history is necessary. *See id.* at 715.

> The Supreme Court has held that the wage priority does not extend to fringe benefits, such as pension fund or health insurance contributions. When the wage priority was last amended in 1926, perhaps the intent of Congress was not to extend it in that fashion, because fringe benefits were little heard of at the time. Now, however, to ignore the reality of collective bargaining that often trades dollars for fringe benefits does a severe disservice to those working for a failing enterprise.
>
> In recognition of the changes since 1926, the bill . . . establishes a new category, a fourth priority immediately following the wage priority, for contributions and payments to employee benefit plans. This will include health insurance programs, life insurance plans, pension funds, and **all other forms of employee compensation**

> **that is not in the form of wages** (emphasis added).[7]

Id. (citing H.R. Rep. No. 95-595, at 187 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6148 (footnotes omitted). The legislative history further provides as to § 507(a)(4):

> Paragraph (4) overrules *United States v. Embassy Restaurant*, 359 U.S. 29, 79 S.Ct. 554, 3 L.Ed.2d 601 (195[9]), which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered after the earlier of one year before the bankruptcy case and the date of cessation of the debtor's business.

---

[7] Conspicuously absent from the legislative history is any mention of workers' compensation insurance. The 1934 amendment to the Bankruptcy Act actually provided a seventh priority for workers' compensation claims; however, four years later, Congress abolished the priority status of these claims. *See United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 79 S. Ct. 554, 3 L. Ed. 2d 601, 603-05 (1959). Therefore, Congress is well aware of workers' compensation insurance and can choose to explicitly include premiums for such in § 507(a)(4) if it chooses. Had Congress intended the statute to extend to claims for workers' compensation insurance premiums, it would have been made clear by the statute (which it is not) or set forth in the legislative history (which it is not).

Id. at 715-16 (citing H.R. Rep. No. 95-595, at 357 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (footnotes omitted); *see also* S. Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855.

Upon a review of the above-quoted portions of § 507(a)(4)'s legislative history, the Tenth Circuit found that "the legislative history clarifies that § 507(a)(4) grants priority for 'fringe benefits' accepted in lieu of wages." *Id.* at 715. The Tenth Circuit also found that Congress enacted § 507(a)(4) to **benefit employees not employers.** *See id.* at 716. Consequently, the Tenth Circuit found that workers' compensation coverage could not possibly be a fringe benefit or wage substitute contemplated by § 507(a)(4).

> Workers' compensation coverage . . . is not a fringe benefit that an employee can bargain for, either explicitly or implicitly, in lieu of higher wages. It is not a fringe benefit or wage substitute, as contemplated by Congress in enacting § 507(a)(4). In addition, the legislative history indicates that workers' compensation is not an employee benefit plan because the coverage benefits the employer at least as much, if not more, than the employee. As both the Bankruptcy Court and the BAP recognized, "since workers' compensation premiums are required to meet an obligation imposed by the state, they were primarily for Southern Star's benefit, not its employees."[8]

Id.

---

[8] Oklahoma's workers' compensation scheme is a compromise between workers and employers. Workers give up the right to sue for damages for work-related injuries and

B. The Eighth Circuit Decision – The HLM Case

In *HLM*, the Eighth Circuit held that unpaid workers' compensation insurance premiums are not entitled to priority under § 507(a)(4).[9] *In re HLM Corp.*, 62 F.3d 224, 227 (8th Cir. 1995). In doing so, the Eighth Circuit opinion substantially adopts the reasoning of the bankruptcy court and the district court below on two primary points. *See id.* at 225.[10] First, the Eighth Circuit confirmed that premiums for workers' compensation insurance are not wage substitutes because of their mandatory nature; "employers cannot offer (and employees cannot accept)

---

employers give up certain defenses, i.e., the "fellow servant rule." *See generally Carroll v. District Court*, 579 P.2d 828 (Okla. 1978) and *Brooks v. A.A. Davis & Co.*, 124 Okla. 140, 254 P. 66 (1926). Therefore, in Oklahoma as elsewhere, the workers' compensation scheme benefits the employer at least as much as it benefits the employees.

[9] Petitioner asserts that this holding was expressly limited by the Eighth Circuit to Minnesota's workers' compensation scheme. Respondent disagrees. The holding in *HLM* reads as follows, "[w]e conclude that unpaid pre-petition premiums under Minnesota's workers' compensation scheme do not constitute 'contributions to an employee benefit plan,' and thus do not support [the insurer's] claimed priority status under § 507(a)(4) of the Bankruptcy Code." 62 F.3d at 227. Notwithstanding the foregoing, there is no indication by the Eighth Circuit that their holding is so limited. Moreover, if the Eighth Circuit intended to limit the holding to Minnesota law, there would have been no need to criticize the Ninth Circuit's opinion as 'excessively broaden[ing] the reach of the Code language in question." *Id.*

[10] The bankruptcy court decision is reported in *In re HLM Corp.*, 165 B.R. 38 (Bankr. D. Minn. 1994) and the district court decision is reported in *Employers Ins. of Wausau v. Ramette (In re HLM Corp.)*, 183 B.R. 852 (D. Minn. 1994).

higher wages as a substitute for workers' compensation benefits." *Id.* at 226. Second, the Eighth Circuit agreed that the "contribution" of workers' compensation insurance premiums does not "benefit" employees within the meaning of "employee benefit plan" because it is primarily the employer and not the employee who benefits. *See id.*

In the *HLM* cases, the Eighth Circuit, the District Court and the Bankruptcy Court all agreed on the ultimate holding. However, it should be noted that the courts varied in the degree of reliance they placed on the "plain language" of § 507(a)(4) versus the legislative history. In holding that workers' compensation insurance premiums are not entitled to fourth priority status under § 507(a)(4), the *HLM* Bankruptcy Court construed the plain meaning of the language of this statute, and articulated the following reasons for its holding: (1) the employer/debtor's payment of premiums to a workers' compensation insurance carrier is not a "contribution" to an employee benefit plan because the term "contribution" implies a voluntary act and workers' compensation insurance is statutorily mandated; (2) workers' compensation insurance is not a "plan" because a "plan" is typically a mechanism for an employer to compensate employees in ways other than wages and workers' compensation insurance is a "statutorily mandated system to spread the risks of work-related injuries"; (3) the payment of workers' compensation insurance premiums does not "benefit" the employees as the term "employee benefit plan" logically suggests but instead "benefits" the employer as it is the employer who is insured from its statutory liability to provide workers' compensation benefits; (4) § 507(a)(4) requires that the priority claim arise from a "service"

rendered 180 days prior to the bankruptcy filing and a claim for unpaid workers' compensation insurance premiums does not arise from a "service" but from the debtor's failure to pay its insurance carrier. *HLM*, 165 B.R. at 40-41. The *HLM* Bankruptcy Court concluded that the plain meaning of § 507(a)(4) clearly illustrates that unpaid workers' compensation insurance premiums are not contributions to an employee benefit plan, and also found that the legislative history of § 507(a)(4) supported this conclusion.

> Section 507(a)(4) was included in the Code to overrule *United States v. Embassy Restaurant*, 359 U.S. 29, 79 S.Ct. 554, 3 L.Ed.2d 601 (1958) [sic] and *Joint Industry Board v. United States*, 391 U.S. 224, 88 S.Ct. 1491, 20 L.Ed.2d 546 (1968) which held that fringe benefits were not entitled to wage priority status. The theory behind § 507(a)(4) is that, in the realities of collective bargaining agreement negotiations, employees may give up certain claims for wages in exchange for fringe benefits. As a result, the fringe benefits earned 180 days before the filing of a bankruptcy petition should be entitled to priority *in the same way and for the same reason that wages are entitled to priority* (citations omitted). The legislative history makes it clear that § 507(a)(4) covers those types of benefits that typically are bargained for in the employer-employee setting whether as part of a collective bargaining arrangement or otherwise. *Workers' compensation is not a bargained for benefit. Rather, it is a statutorily mandated system of imposing liability on an employer for an employee's injuries arising out of the workplace.*

Id. at 41 (emphasis added).

The *HLM* District Court affirmed the *HLM* Bankruptcy Court's holding, but focused primarily on the legislative history of the statute, and concluded that an employer's workers' compensation premium payments are not wage substitutes and, therefore, are not entitled to a fourth priority. *See HLM*, 183 B.R. at 857. The *HLM* District Court concluded that the plain language of § 507(a)(4), as well as the legislative history of the statute, demonstrate that contributions to an "employee benefit plan" are not the same as employer's workers' compensation premium benefits. *See id.* at 856. The *HLM* District Court further found that this construction of the statute was consistent with the purposes of the Bankruptcy Code.

> Section 507(a)(4) was adopted specifically to place non-monetary compensation owed by a debtor to its employees on the same level as wage compensation. As discussed, workers' compensation insurance payments are not a wage substitute. More generally, the Code was promulgated to ensure the fair and uniform treatment of creditors. To that end, preferential treatment is given to unsecured creditors only in exceptional circumstances. [The insurer] has provided no compelling reason to show why funds should be taken from [the debtor's] other unsecured creditors and given to it.

Id.

The Eighth Circuit opinion begins with the observation that the Bankruptcy Code does not define the phrase "contributions to an employee benefit plan" but recognizes that the legislative history is "instructive and illuminating." *HLM*, 62 F.3d at 225. Therefore, while not entirely clear, it would appear that the Eighth Circuit

found the language of § 507(a)(4) ambiguous and thought reference to the legislative history was necessary. In fact, the Eighth Circuit opinion expressly indicates that both the *HLM* Bankruptcy Court and the *HLM* District Court were satisfied that their respective holdings were consistent with **both** the language of § 507(a)(4) and its legislative history. *HLM*, 62 F.3d at 225-26.

C. The Ninth Circuit Decision – The Plaid Pantries Case

The Ninth Circuit rendered the first circuit court of appeals decision on the priority status to be afforded unpaid workers' compensation insurance premiums in *Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993).[11] In analyzing § 507(a)(4), the Ninth Circuit correctly recognizes that the statute was enacted by Congress to overrule this Court's two opinions holding that fringe benefits were not entitled to wage priority status, to-wit: *Joint Indust. Bd. v. United States*, 391 U.S. 224, 88 S. Ct. 1491, 20 L. Ed. 2d 546 (1968) and *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 79 S. Ct. 554, 3 L. Ed. 2d 601 (1959). *See id.* at 607. The Ninth Circuit also correctly finds that § 507(a)(4) was enacted to "provide a level of priority for 'fringe benefits' " and "to include forms of contribution not contemplated in the

---

[11] Although the Ninth Circuit does not cite it or rely on it, the first and only other published opinion on this issue at the time of the *Plaid Pantries* decision was *In re AOV Industries, Inc.*, 85 B.R. 183 (Bankr. D.C. 1988), which is in accord with the Ninth Circuit holding.

1898 Act." *Id.*[12] Notwithstanding, the Ninth Circuit holds that unpaid workers' compensation insurance premiums are entitled to priority under § 507(a)(4) as a "contribution to an employee benefit plan." *See id.* The Ninth Circuit reasoned that the workers' compensation system is designed to benefit employees and that such benefits are indirectly a form of compensation in exchange for labor. *See id.* at 607.

In rendering its holding, the Ninth Circuit specifically rejected as irrelevant any distinction between statutorily-mandated insurance programs, such as workers' compensation insurance, and contractually-based insurance programs, such as health and life insurance voluntarily provided by employers to employees. *See id.* Further, the Ninth Circuit held that the "benefits" involved need not be "wage substitutes" in order to fall within the priority of § 507(a)(4). *See id.*

D. There Is No Meaningful And Important Conflict Among The Circuit Courts.

This Court's Rule 10 requires that there be compelling reasons for review on certiorari. Even where there

---

[12] Oddly enough, however, despite the fact that the Ninth Circuit apparently resorts to the legislative history of § 507(a)(4), it barely discusses the legislative history, other than to state that "[it] was added to overrule those two cases and to provide a level of priority for 'fringe benefits' and "[it] expanded the priorities to include contributions to 'employee benefit plans,' forms of contribution not contemplated in the 1898 Act." *Plaid Pantries*, 10 F.3d at 607. Conspicuously absent from its discussion of the legislative history, are the various clear statements regarding Congress' intent that the fourth priority be **limited** and that it cover **wage substitutes.**

may be a conflict between the decisions of two or more circuit courts of appeals, the conflict must be with regard to an "important" matter, and there still must be compelling reasons for review. Respondent respectfully submits that the conflict between the Ninth Circuit on the one hand and the Eighth Circuit and Tenth Circuit on the other hand does not satisfy the requirements of Rule 10.

Petitioner summarily argues that there is an irreconcilable conflict between the Ninth Circuit, the Eighth Circuit and the Tenth Circuit, because the Ninth Circuit has held that a claim for unpaid workers' compensation insurance premiums is entitled to priority under § 507(a)(4) and the Eighth Circuit and the Tenth Circuit have held such a claim is not entitled to priority. Petitioner attempts to "broaden" the conflict by asserting that there are "4 critical questions which must be addressed before this issue can be completely resolved," to-wit: (1) the use of the ERISA definition of "employee benefit plan" in interpreting § 507(a)(4); (2) the applicability of § 507(a)(4) to non-employee third parties; (3) whether benefits must be directly bargained for under § 507(a)(4); and (4) whether there is a valid distinction between workers' compensation insurance and other types of insurance. Petition at p. 15.

While it is of course true that the Ninth Circuit's holding is in conflict with the holdings of the Eighth Circuit and the Tenth Circuit, a careful reading of the three courts' opinions reveals that **the actual issue in conflict** is much more narrow. All three courts are in agreement that resort to the legislative history is necessary, and all three courts agree that the legislative history shows that § 507(a)(4) was enacted to provide a priority for "fringe benefits." The critical disagreement among the

circuit courts is whether or not workers' compensation insurance coverage is a "fringe benefit." Arguably, this "fringe benefit" issue is encompassed by Petitioner's "fourth issue" above.[13]

Under the circumstances, Respondent respectfully submits that the conflict as to the "fringe benefit" issue is not sufficiently material and important to warrant this Court's review on certiorari. As the single opinion in disagreement with two other circuit courts' opinions, the circumstances surrounding and the character of the *Plaid Pantries* opinion are both appropriate factors to consider. It is important to note that the Ninth Circuit rendered the first circuit court of appeals decision on the priority status to be afforded unpaid workers' compensation insurance premiums under § 507(a)(4). Surprisingly, however, the brevity of the opinion almost renders it a summary opinion. It is also relevant that the Eighth Circuit in *HLM* and the Tenth Circuit in *Southern Star* disagreed with the

---

[13] However, the other three "issues" posited by Petitioner are simply not in conflict among the circuit courts of appeals. As to the "ERISA definition," in *Plaid Pantries*, the Ninth Circuit expressly declines to reach the issue. *See Plaid Pantries*, 10 F.3d at 607. With respect to the "third party claimant" issue, the Eighth Circuit opinion in *HLM* is silent on this issue and the Tenth Circuit expressly declines to reach the issue in *Southern Star*. *See Southern Star*, 144 F.3d at 717, n. 6. Likewise, there is no conflict between the three circuit courts as to a requirement under § 507(a)(4) that wage substitutes be the result of direct bargaining or formal agreement, as none of the opinions expressly address the issue. In *Southern Star*, the Tenth Circuit discusses the fact that this issue was decided by the First Circuit in *Saco*. *See id*. However, the Tenth Circuit then concludes that its decision is not in conflict with *Saco*. The opinions in *Plaid Pantries* and *HLM* are both silent on the issue.

Ninth Circuit's holding in *Plaid Pantries* because the holding had the impermissible effect of interpreting bankruptcy priorities broadly, rather than narrowly. *See HLM*, 62 F.3d at 227; *Southern Star*, 144 F.3d at 716.

Finally, it is significant that not one court has adopted the holding of the Ninth Circuit in *Plaid Pantries* since the Eighth Circuit entered its ruling in *HLM*.[14] Conversely, five courts in three different bankruptcy cases have rendered the same holding as the Eighth Circuit, to-wit: *In re Southern Star Foods, Inc.*, 144 F.3d 712 (10th Cir. 1998), *aff'g*, 210 B.R. 838 (Bankr. 10th Cir. 1997), *aff'g*, 201 B.R. 291 (Bankr. E.D. Okla. 1996); *In re Birmingham Nashville Express, Inc.*, 221 B.R. 194 (Bankr. M.D. Tenn. 1998); *In re Allentown Moving & Storage, Inc.*, 208 B.R. 835 (Bankr. E.D. Pa. 1997), *aff'd*, 214 B.R. 761 (E.D. Pa. 1997). This last factor alone would seem to militate in favor of denying the Petition. This Court has said, "in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." *Rice v. Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897, 903 (1955).

---

[14] Petitioner states that *In re Braniff, Inc.*, 218 B.R. 628 (Bankr. M.D. Fla. 1998) holds that claims for workers' compensation insurance premiums are entitled to priority status under § 507(a)(4). However, this case did not involve a claim for workers' compensation insurance premiums, rather it involved a claim under a group health and life insurance policy. The court was interpreting § 507(a)(4)(B)(ii) in order to quantify the health and life insurer's claim. Therefore, its holding that a government mandated insurance program (i.e., workers' compensation) is included in the definition of "employee benefit plan" is distinguishable.

One commentator, in discussing a conflict among the circuit courts as a ground for certiorari, has stated:

> [T]he nub of all these qualifications is that a conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved by the Supreme Court alone, and that the disagreement among the lower courts is one that should promptly be dissolved.

23 *Moore's Federal Practice*, § 510.21[2] at p. 510-16 (Matthew Bender 3d ed.) (quoting Harlan, *Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958)).

In the instant case, the timing of the Ninth Circuit decision in *Plaid Pantries* and the decisions that have followed it are significant in assessing the importance of the conflict. The fact that the Ninth Circuit rendered the first decision on this issue, and it was followed by two other circuit court opinions to the contrary, evidences that the likelihood of future impact from the *Plaid Pantries* decision is small. Moreover, the scant case law on this issue also indicates that the issue does not arise with much frequency. There is simply no compelling reason why such minimal conflict can be resolved only by review on certiorari by this Court. To the contrary, the circuit courts should be allowed to further consider the question presented to see if they perceive an ongoing and material conflict.

IV. Misapplication of Law

In 1995, Rule 10 was amended and the last sentence of Rule 10, setting out two circumstances under which the Court rarely grants review on certiorari, was added. It

provides that a petition for certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. These changes appear to have had the purpose of narrowing the grounds pursuant to which certiorari is granted. It would appear that the reasoning behind this change was that the Court, in a need to limit its docket, should review only true conflicts in the interpretation of the law, not its application.

The brevity and summary nature of the *Plaid Pantries* decision makes it difficult to determine how the Ninth Circuit reached its holding that claims for unpaid workers' compensation insurance premiums are entitled to priority under § 507(a)(4). This determination is difficult because the Ninth Circuit's initial interpretation of the statute, when viewed in the context of the legislative history, is correct.

> In 1978, Section 507(a)(4) was added to the Bankruptcy Code in order to overrule those two cases and to provide a level of priority for "fringe benefits." The statute expanded the priorities to include contributions to "employee benefit plans," forms of contribution not contemplated in the 1898 Act. It "recognize[d] the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted."

Plaid Pantries, 10 F.3d at 607 (citations omitted).

Notwithstanding the Ninth Circuit apparently then determined that workers' compensation insurance is a "fringe benefit."

> The workers' compensation system is designed to provide benefits to victims of work related injuries. Those benefits are generally funded by

> insurance, the premiums for the insurance are paid by the employers, and the costs are passed on in the form of lower wages and higher prices. Those benefits are a form of compensation offered to workers in exchange for the labor that they perform.

Id. Therefore, it may be reasonable to conclude that the Ninth Circuit's holding is more the result of its misapplication of the term "fringe benefit" than its misinterpretation of § 507(a)(4).[15]

Further, it would appear that the Ninth Circuit misapplied general bankruptcy law principles regarding priority claims. Generally, the granting of a priority in bankruptcy requires a "clear expression of Congressional intent." *See In re P.J. Nee Co.*, 36 B.R. 609, 611 (Bankr. D. Md. 1983) (citing *In re Lorber Indus. of California*, 675 F.2d 1062, 1068 (9th Cir. 1982)). Because there is a presumption in bankruptcy cases that the debtor's resources will be

---

[15] A claim for workers' compensation insurance premiums does not fit any common meaning of the term "fringe benefit." Black's Law Dictionary defines "fringe benefits" as "side benefits which accompany or are in addition to a person's employment such as paid insurance, recreational facilities, profit-sharing plans, paid holidays and vacations, etc. Such benefits are in addition to regular salary or wages and are a matter of bargaining in union contracts." *Black's Law Dictionary* 601 (5th ed. 1979). Webster's Ninth New Collegiate Dictionary defines "fringe benefits" in similar fashion as "an employment benefit (as a pension, a paid holiday, or health insurance) granted by an employer that involves a money cost without affecting basic wage rates." *Webster's Ninth New Collegiate Dictionary* 494 (1983). These definitions show that "fringe benefits" are wage substitutes.

equally distributed among his or her creditors, statutory priorities are to be narrowly construed. *See Joint Indus. Bd. v. United States*, 391 U.S. 224, 228, 88 S. Ct. 1491, 20 L. Ed. 2d 546 (1968); *In re Amarex*, 853 F.2d 1526, 1530 (10th Cir. 1988) (citing *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 100 (2d Cir. 1986)); *In re Olga Coal Co.*, 194 B.R. 741, 745 (Bankr. S.D.N.Y. 1996); *In re HLM Corp.* 183 B.R. 852, 854 (D. Minn. 1994). Additionally, if one claimant is to be preferred over other claimants, the purpose needs to be clear from the statute. *See Nathanson v. NLRB*, 344 U.S. 25, 29, 73 S. Ct. 80, 83, 97 L. Ed. 23 (1952); *Matter of Jartran, Inc.*, 732 F.2d 584, 586 (7th Cir. 1984); *Olga Coal*, 194 B.R. at 745. In the instant case, the Ninth Circuit's holding results in an extremely broad reading of § 507(a)(4). This was exactly the criticism of the *Plaid Pantries* decision voiced by both the Eighth Circuit and the Tenth Circuit.

On the other hand, the Tenth Circuit correctly interpreted and applied the requirements of § 507(a)(4). The legislative history of § 507(a)(4) provides that § 507(a)(4) was enacted to specifically overrule two of this Court's cases which held that contributions to a union-sponsored employee benefit plan did not constitute wages entitled to priority status under the Bankruptcy Code's priority statute in existence at that time. In the Congressional Reports, it is clear that § 507(a)(4) was enacted by Congress to provide a "fringe benefit" analog to the wage priority of § 507(a)(3). The express language of the legislative history refers to "fringe benefits" as a *substitute* for wages and provides that § 507(a)(4) is to be *limited*. This interpretation comports with the requirement that priorities be construed narrowly and is consistent with the fact that § 507(a)(4) was intended to overrule cases which

dealt with traditional fringe benefits. Further, the legislative history explains that the phrase "contributions to an employee benefit plan" is intended to **only** encompass forms of employee compensation that are not in the form of wages.

A claim for workers' compensation insurance premiums does not fit any common meaning of the term "fringe benefit." Such a claim cannot possibly constitute a contribution by an employer to a compensation plan intended for the benefit of employees and as a substitute for additional wages. Rather, it arises from a statutory mandate to spread the risks of work-related injuries, and by its very nature, is more of a benefit to the employer than the employee. If the employer secures workers' compensation insurance, it is insured from its statutory liability to its employees. The employer is the insured, not the employees. However, even if the employer is uninsured, the employer must provide its employees with workers' compensation benefits. In the instant case, Southern Star's employees' workers' compensation claims were to be satisfied by Petitioner, regardless of whether Southern Star paid the premiums.

The Tenth Circuit rendered its decision in the context of the well settled bankruptcy law on priorities. The intent to grant a priority has to be clear and, subsequently, priorities are to be narrowly construed. The Tenth Circuit also rendered its decision within the context of the Bankruptcy Code's general purpose of fair and uniform treatment of creditors. As the many courts who are in agreement with the Tenth Circuit's holding have recognized, there is simply no compelling reason to favor claimants such as Petitioner and give them preferential treatment to the detriment of a bankrupt debtor's other

unsecured creditors. To allow priority to an insurer for a claim for unpaid workers' compensation insurance premiums goes beyond the Congressional intent and does violence to the policy and purpose behind the priority statute, as well as the Bankruptcy Code in general. The statutory language and the legislative history of § 507(a)(4), especially within the foregoing context, correctly resulted in the Tenth Circuit's decision holding that Petitioner's claim is not entitled to priority under § 507(a)(4).

CONCLUSION

Based on the foregoing, Respondent, Kenneth G.M. Mather, as trustee of the bankruptcy estate of Southern Star Foods, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari of Petitioner, The State Insurance Fund.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

PAMELA H. GOLDBERG
320 South Boston, Suite 300
Tulsa, Oklahoma 74103
(918) 594-0400

Attorneys for Respondent